

A Tetuan Bahari Choy & Nongchik (law firm sued as a partnership) v Harta Megajaya Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO C-02(NCVC)(W)-2016–10 OF 2017
VERNON ONG, HARMINDAR SINGH AND KAMALUDIN MD
SAID JJCA
12 JUNE 2019

C *Legal Profession — Conflict of interest — Professional negligence/breach of contract — Law firm acted for buyer of lands in sale and purchase agreement and for bank in its loan agreement with buyer — Firm failed to inform buyer that it was also acting for bank — Firm failed to advise bank that apart from charge on lands there were private caveats lodged by third party — Whether firm's decision not to release redemption sum to chargee in view of existence of private caveats caused lands to be auctioned off to third party — Whether firm liable to buyer for breach of contract and professional negligence — Whether buyer failed to prove damages it claimed and was entitled to only nominal damages*

E The respondent ('Megajaya') entered into a sale and purchase agreement ('SPA') to buy 24 parcels of land ('the lands') following an agreement between itself, the owner of the lands and another company ('Zest Properties') that Megajaya would take over from Zest Properties the task of developing the lands. Under the tripartite agreement, Megajaya had to redeem the lands by paying RM400,000 to the chargee ('MBSB'). Towards that end, Megajaya obtained a RM400,000 loan from Public Bank Bhd ('PBB'). The appellant acted for Megajaya in the SPA and for PBB in the loan transaction. On the appellant's advice that it was safe for PBB to disburse the redemption sum, PBB sent a cheque for RM400,000 to the appellant for onward transmission to MBSB. The appellant, however, returned the cheque to PBB on realising that although MBSB undertook to discharge/withdraw its charge and caveats on the lands, there were private caveats lodged on two parcels of the lands by a former purchaser. Since MBSB failed to receive the redemption sum, it auctioned off the lands to a third party. Consequently, the SPA fell through and Megajaya sued the appellant for damages for breach of contract and professional negligence. The High Court found the appellant liable and ordered it to pay Megajaya RM300,000 in damages. The court held that the appellant put itself in a position of conflict of interest by acting for both

F

G

H

I Megajaya and PBB and that it should have been aware that if the redemption sum was not paid, Megajaya would not be able to acquire the lands for development and earn profits therefrom. As for damages, the High Court held that Megajaya had failed to prove its claim for RM5m in damages and that the actual loss it suffered was only about RM300,000. In its instant appeal against

the decision, the appellant argued that under the tripartite agreement, Megajaya was supposed to remove the private caveats entered by the former purchaser. The appellant also submitted that the damages awarded by the High Court had no basis as Megajaya had not proven its damages and that a valuation report it had tendered in evidence was of no probative value. Megajaya said the finding on liability should not be disturbed as the appellant had acted in a position of conflict of interest to Megajaya's detriment and failed to ensure that the private caveats lodged by the former purchaser were withdrawn/removed.

Held, affirming the High Court's finding on liability but substituting the High Court's award of general damages with nominal damages of RM100:

- (1) The High Court's finding on liability was not inconsistent with the totality of the evidence on the record. It was not plainly wrong and did not warrant appellate intervention. The appellant acted for both Megajaya and PBB in separate transactions and it ought to have advised both parties that the two private caveats of the former purchaser were not included under MBSB's undertaking and the risks related thereto. The appellant did not inform Megajaya that it was also acting for PBB in the loan transaction and the risks related thereto. The appellant's advice to PBB to release the loan sum wrongly ignored or discounted the impediment posed by the two private caveats. There was no evidence to support the appellant's assertion that it had informed Megajaya to pay the former purchaser to remove the two private caveats. The evidence on the whole pointed to the appellant's omission to take the necessary measures which was not unexpected as it had acted for two parties in separate transactions and put itself in a position of conflict of interest between PBB and Megajaya (see para 14).
- (2) On the evidence, Megajaya failed to prove the damages it sought. The documents tendered in support of its claim, in particular exhs P1, P2 and P3, were by themselves insufficient to establish the claim. P2 was only a projection at best. It was not sufficient to merely write down the particulars to prove a claim for damages. There was no independent documentary or other evidence to support the estimates and projections. The High Court correctly found that the projections were misplaced and inaccurate as they did not take into account set-offs for incidental costs relating to the acquisition of the lands and development expenses. The valuer's report (exh P1) carried no weight as it was not prepared by a quantity surveyor. P1 failed to take into account incidental costs relating to development costs. SP1, who prepared P1, admitted that the figures in the report were cut and pasted from exh P2 prepared earlier by Megajaya. In the final analysis, the claim for damages was not proven on balance of probabilities (see para 18).

- A (3) As the High Court had found that the loss and damages were foreseeable and not remote, and since Megajaya had failed to prove the fact and amount of damages, nominal damages in the sum of RM100 was awarded to Megajaya (see para 19).

B **[Bahasa Malaysia summary]**

- C Responden ('Megajaya') telah memasuki perjanjian jual beli ('PJB') untuk membeli 24 bidang tanah ('tanah tersebut') berikutan satu perjanjian antaranya, pemilik tanah tersebut dan syarikat lain ('Zest Properties') bahawa Megajaya akan mengambil alih daripada Zest Properties kerja membangunkan tanah tersebut. Di bawah perjanjian tiga pihak, Megajaya terpaksa menebus tanah tersebut dengan membayar RM400,000 kepada pemegang gadaian ('MBSB'). Untuk mencapai matlamat itu, Megajaya memperoleh pinjaman RM400,000 daripada Public Bank Bhd ('PBB'). Perayu bertindak untuk Megajaya dalam PJB tersebut dan untuk PBB dalam transaksi pinjaman. Atas nasihat perayu bahawa ia selamat untuk PBB membayar dahulu jumlah penebusan, PBB menghantar cek RM400,000 kepada perayu untuk transaksi yang dimajukan kepada MBSB. Perayu, bagaimanapun, telah mengembalikan cek itu kepada PBB setelah menyedari bahawa walaupun MBSB telah mengambil tindakan untuk melepaskan/menarik balik gadaianya dan kaveat-kaveat di atas tanah tersebut, terdapat kaveat-kaveat persendirian yang dimasukkan atas dua bidang tanah tersebut oleh pembeli terdahulu. Oleh kerana MBSB gagal menerima jumlah penebusan itu, ia telah melelongkan tanah tersebut kepada pihak ketiga. Akibatnya, SPA itu gagal dan Megajaya telah menyaman perayu untuk ganti rugi kerana pelanggaran kontrak dan kecuai profesional. Mahkamah Tinggi mendapati perayu bertanggungjawab dan memerintahkannya membayar ganti rugi berjumlah RM300,000 kepada Megajaya. Mahkamah memutuskan bahawa perayu telah meletakkan dirinya dalam kedudukan konflik kepentingan dengan bertindak untuk kedua-dua Megajaya dan PBB dan bahawa ia sepatutnya sedar bahawa jika jumlah penebusan itu tidak dibayar, Megajaya tidak dapat memperoleh tanah tersebut untuk pembangunan dan mendapat keuntungan daripadanya. Bagi ganti rugi, Mahkamah Tinggi berpendapat bahawa Megajaya gagal membuktikan tuntutan untuk ganti rugi RM5 juta dan kerugian sebenar yang ditanggung itu hanya kira-kira RM300,000. Dalam rayuannya ini terhadap keputusan tersebut, perayu berpendapat bahawa di bawah perjanjian tiga pihak, Megajaya sepatutnya membatalkan kaveat-kaveat peribadi yang dimasukkan oleh pembeli terdahulu. Perayu juga mengemukakan bahawa ganti rugi yang diawardkan oleh Mahkamah Tinggi tidak mempunyai asas kerana Megajaya tidak membuktikan kerugiannya dan bahawa laporan penilaian yang telah ditenderkannya sebagai keterangan tidak ada nilai probatif. Megajaya mengatakan dapatan mengenai liabiliti tidak boleh diganggu kerana perayu telah bertindak dalam kedudukan konflik kepentingan untuk menjejaskan Megajaya dan gagal memastikan bahawa kaveat-kaveat peribadi yang dimasukkan oleh pembeli terdahulu telah ditarik balik/dibatalkan.

Diputuskan, mengesahkan dapatan Mahkamah Tinggi berhubung liabiliti tetapi menggantikan award ganti rugi am Mahkamah Tinggi dengan ganti rugi nominal RM100:

- (1) Dapatan Mahkamah Tinggi mengenai liabiliti tidak bertentangan dengan keseluruhan bukti yang terdapat atas rekod itu. Ia bukannya jelas salah dan tidak mewajarkan campur tangan mahkamah rayuan. Perayu bertindak bagi kedua-dua Megajaya dan PBB dalam transaksi yang berasingan dan ia sepatutnya menasihatkan kedua-dua pihak bahawa kedua-dua kaveat persendirian pembeli terdahulu itu tidak termasuk dalam aku janji MBSB dan risiko yang berkaitan dengannya. Perayu tidak memberitahu Megajaya bahawa ia juga bertindak untuk PBB dalam transaksi pinjaman dan risiko berkaitan dengannya. Nasihat perayu kepada PBB untuk melepaskan jumlah pinjaman yang tersalah diabaikan atau tidak dihiraukan halangan yang ditimbulkan oleh dua kaveat persendirian itu. Tiada keterangan untuk menyokong penyataan perayu bahawa ia telah memberitahu Megajaya untuk membayar pembeli terdahulu bagi membatalkan dua kaveat persendirian itu. Keterangan pada keseluruhannya menunjuk kepada peninggalan perayu untuk mengambil langkah-langkah yang perlu yang tidak dijangka kerana ia telah bertindak untuk dua pihak dalam transaksi berasingan dan meletakkan dirinya dalam kedudukan konflik kepentingan antara PBB dan Megajaya (lihat perenggan 14).
- (2) Berdasarkan keterangan itu, Megajaya gagal membuktikan ganti rugi yang dipohon. Dokumen yang ditender untuk menyokong tuntutan, khususnya ekshs P1, P2 dan P3, dengan sendirinya tidak mencukupi untuk membuktikan tuntutan itu. P2 hanya satu unjuran yang terbaik. Ia tidak mencukupi untuk hanya menulis butir-butir itu untuk membuktikan tuntutan ganti rugi. Tiada dokumentari berasingan atau bukti lain untuk menyokong anggaran dan unjuran itu. Mahkamah Tinggi dengan betul mendapati bahawa unjuran itu tidak kena dan tidak tepat kerana ia tidak mengambil kira penangguhan bagi kos sampingan yang berkaitan dengan pemerolehan tanah dan perbelanjaan pembangunan. Laporan penilai (eksh P1) tidak kukuh kerana ia tidak disediakan oleh juru ukur bahan. P1 gagal mengambil kira kos sampingan yang berkaitan dengan kos pembangunan. SP1, yang menyediakan P1, mengakui bahawa angka-angka dalam laporan tersebut dipotong dan ditampal dari eksh P2 yang disediakan lebih awal oleh Megajaya. Dalam analisis terakhir, tuntutan ganti rugi tidak dapat dibuktikan atas imbalan kebarangkalian (lihat perenggan 18).
- (3) Oleh kerana Mahkamah Tinggi telah mendapati bahawa kerugian dan ganti rugi boleh diramal dan tidak terpecil, dan oleh kerana Megajaya telah gagal membuktikan fakta dan jumlah ganti rugi itu, ganti rugi

A

B

C

D

E

F

G

H

I

- A nominal berjumlah RM100 telah diawardkan kepada Megajaya (lihat perenggan 19).]

Notes

- B For cases on conflict of interest in general, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1514–1526.

Cases referred to

- C *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17, CA (refd)
Ng Siew Lan v John Lee Tsun Vui & Anor [2017] 2 MLJ 167; [2017] 2 CLJ 245, FC (refd)
PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd [2009] 7 MLJ 681, HC (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (refd)

- D **Appeal from:** Suit No 22NCVC-10–07 of 2015 (High Court, Temerloh)

Ong Siew Wan (Andrew David Wong & Ong) for the appellant.
T Gunaseelan (Ikmal Hisam Idris with him) (Gunaseelan & Assoc) for the respondent.

- E

Vernon Ong JCA:

INTRODUCTION

- F [1] The defendant, Bahari Choy & Nongchik is a legal firm who represented the plaintiff in a sale and purchase transaction. The sale transaction was aborted and Harta Megajaya sued the defendant for damages for professional negligence and breach of contract. After a full trial, the High Court allowed the plaintiff's claim and awarded RM300,000 as general damages. This is the defendant's appeal against the High Court decision.
- G

- H [2] After hearing of submission of counsel, we allowed the defendant's appeal in part. The learned judicial commissioner's ('JC') finding on liability was affirmed. However, the learned JC's award of general damages of RM300,000 was set aside and substituted with an award of nominal damages of RM100. Our grounds of decision are as follows.

SALIENT FACTS

- I [3] Noria bt Keimis was the registered and beneficial owner of the land. Noria had created a third party charge of the lands in favour of Malaysia Building Society Bhd ('MBSB'). The third party charge was created to secure a loan given by MBSB to Zest Properties Developer Sdn Bhd. There were also

two private caveats lodged by a former purchaser against two of the 24 parcels of land. A

[4] Pursuant to a sale and purchase agreement dated 12 July 2012 ('SPA'), Noria agreed to sell and Megajaya agreed to purchase the 24 parcels of land for the purchase price of RM650,000. Bahari Choy acted as solicitors for Megajaya in the sale and purchase transaction. B

[5] On even date, Megajaya of the first part, Zest Properties of the second part and Noria of the third part entered into a tripartite agreement 'Perjanjian Persefahaman'. The salient terms included: C

- (a) Zest Properties had failed to develop the lands and failed to service the MBSB loan;
- (b) Megajaya would take over and develop the lands according to approvals from the relevant authorities; D
- (c) Megajaya to pay RM1.1m to Zest Properties and Noria;
- (d) Megajaya to pay RM65,000 to MBSB in part payment of the redemption of the charge and to postpone or cancel the public auction; E
- (e) Megajaya to pay MBSB RM335,000 or such amount as determined by MBSB to redeem the loan taken by Zest Properties. If the settlement sum is less than RM335,000, the excess shall be retained by Megajaya or its solicitors until the completion of the tripartite agreement; F
- (f) Megajaya to pay to Noria RM200,000 after the completion of the development of the land together with CFO;
- (g) Megajaya to pay RM250,000 to Zest Properties after the completion of the development of the land together with CFO; G
- (h) Megajaya to provide a fund of RM250,000. The fund will be utilised to:
 - (i) pay compensation to former purchasers of the land as a result of the cancellation of the sale and purchase with Zest Properties; and
 - (ii) for withdrawal or removal of caveats lodged by former purchasers; H
- (i) Zest Properties and Noria jointly and severally declare and confirm to Megajaya that the actual purchase price for the lands under the SPA is RM400,000 and not RM650,000; and
- (j) Zest Properties and Noria also jointly and severally agreed that in the event that the former purchaser of the two caveated lots is not agreeable to Megajaya's offer to proceed with the development or to withdraw the two private caveats, then Megajaya will not purchase the two parcels and Megajaya will deduct the amount payable to Zest Properties under sub-para (g) above. I

A [6] Megajaya obtained a loan of RM400,000 from Public Bank Bhd ('PBB') to part-finance the purchase of the land. Bahari Choy was also appointed by PBB to act for PBB for the loan transaction.

B [7] On 26 March 2013, Bahari Choy wrote to PBB informing that the security documents are in order and that PBB may disburse the loan. On 27 March 2013, PBB forwarded a banker's cheque for RM400,000 being the redemption sum to Bahari Choy for onward transmission to MBSB.

C [8] By letter dated 28 March 2013, Bahari Choy returned PBB's banker's cheque. Bahari Choy informed PBB that whilst MBSB's undertaking related to the discharge of charge and withdrawal of caveat, it did not include the withdrawal of the two private caveats by the former purchaser. As such, they could not risk forwarding PBB's banker's cheque to MBSB.

D [9] As the redemption sum due to MBSB was not settled, MBSB auctioned the lands to a third party. Consequently, the SPA fell through and the plaintiff sued the defendant for damages for breach of contract and professional negligence.

E FINDINGS OF THE HIGH COURT

F [10] In holding that the plaintiff had succeeded in proving breach of contract and professional negligence against the defendant, the learned JC made the following findings:

- (a) Bahari Choy was aware that: (i) Megajaya purchased the lands for development purposes; (ii) the loan taken by Megajaya was to be used to redeem the lands from MBSB; and (iii) there were private caveats lodged against two of the 24 parcels of the land;
- G (b) Bahari Choy ought to have been aware that if the redemption sum was not settled, Megajaya would not be able to take ownership of the lands and develop the lands and earn profits therefrom;
- H (c) Bahari Choy ought to have advised Megajaya that the loan could not be utilised to settle the redemption sum due to MBSB because of the existence of the private caveats; and
- I (d) Bahari Choy acted in a position of conflict of interest when it acted for both Megajaya and PBB (*Ng Siew Lan v John Lee Tsun Vui & Anor* [2017] 2 MLJ 167; [2017] 2 CLJ 245 (FC)).

[11] The learned JC's grounds for awarding general damages of RM300,000 may be summarised as follows:

- (a) the claim for a sum not exceeding RM5m as general damages was not

supported by the evidence. The projected income and expenses (exhs P2 and P3) and annexures produced did not factor in the costs and expenses to be incurred by Megajaya;

A

- (b) after deducting the costs of acquisition of the land, finance charge and the sums payable under the *perjanjian persefahaman*, the actual loss suffered by Megajaya arrived at is RM301,010 (see paras 33(i), (ii) and (iii) and 34 of the learned JC's grounds of judgment); and

B

- (c) the claim for special damages was dismissed as Megajaya failed to adduce any evidence to support the claim.

C

SUBMISSION OF PARTIES

[12] Learned counsel for Bahari Choy argued that Megajaya was aware of the existence of the two private caveats and that Megajaya was supposed to remove the same. They informed Megajaya that the private caveats would be withdrawn once the former purchaser is refunded the monies paid. In advising PBB not to utilise the loan to settle the redemption sum, Bahari Choy was protecting Megajaya. As for damages, learned counsel argued Megajaya had failed to prove the damages claimed. Exhibits P2, P3 and annexures are only self-serving documents and wholly without any basis. The valuation report (exh P1) prepared by SP1 is of no probative value; SP1 is not qualified or competent to prepare the report as he is only a property valuer and not a quantity surveyor.

D

E

[13] In reply, learned counsel for Megajaya argued that the findings of the learned JC on liability was supported by the evidence on the record. Bahari Choy was acting in a position where they were in a conflict of interest and they failed to inform Megajaya of the same. Bahari Choy was well aware of the existence of the private caveats but failed to ensure that the former purchaser was willing to withdraw the private caveats. As such, the findings of the learned JC was not plainly wrong and should not be disturbed. As to damages, it was submitted that the learned JC did not rely entirely on the valuer's report (exh P1). Further, Bahari Choy did not produce any rebuttal evidence to challenge the projected income and expenses (exhs P2 and P3).

F

G

H

DECISION

[14] As to liability, we are of the view that the learned JC's finding is not inconsistent with the totality of the evidence on the record. The undisputed fact indicates that Bahari Choy was acting for Megajaya in the SPA transaction. Bahari Choy also took on the additional role as solicitors for PBB the lending bank. They ought to have advised both Megajaya and PBB that the two private caveats were not included under MBSB's undertaking and the risks related thereto. In that capacity, Bahari Choy failed to inform Megajaya that they were

I

- A acting as the common solicitor in respect of the loan transaction and the risks thereto. Instead, Bahari Choy advised PBB that it was in order to release the loan sum. Clearly, that advice wrongly ignored or discounted the impediment posed by the two private caveats. Further, there is no evidence to support Bahari Choy's assertion that they had informed Megajaya to pay the former purchaser so as to remove the private caveat. The evidence on the whole points to Bahari Choy's omission for failing to take the necessary measures. It is not unexpected that such a situation may arise especially where a solicitor acts for both parties, as in this case, putting itself in a position of conflict of interest between PBB and Megajaya. As such, the learned JC's finding on liability is not plainly wrong and appellate intervention is not warranted.

- D [15] As to damages, it is settled law that in order for a claimant to succeed in its claim the claimant must show that the loss and damages is due to the breach of contract or negligence by the defendant. Once that is established, the claimant has the additional burden of proving the damages.

- E [16] Put simply, the burden of proof is on the claimant to prove the facts and the amount of damages (*Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229 (CA)). Further, the damages must be proved with real or factual evidence. Mere particulars, summaries, estimations or general conclusions will not suffice (*Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17 (CA); *PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd* [2009] 7 MLJ 681 (CA) at p 697).

- F [17] It is pertinent to observe that according to the statement of claim, Megajaya had prayed for general damages of up to RM5m and special damages of RM139,898.50.

- G [18] Having perused the evidence on the record, we are of the view that Megajaya has failed to prove the damages sought. The documents tendered in support of the claim, in particular exhs P1, P2 and P3 are by themselves insufficient to establish liability against Bahari Choy. P2 is only a projection at best. We do not think that it is sufficient to merely write down the particulars to prove the claim for damages sought. There was no independent documentary or other evidence to support the estimates and projections. We also agree with the learned JC that the projections were misplaced and inaccurate as they did not take into account sets off for incidental costs relating to the acquisition of the lands and development expense. Further, the valuer's report exh P1 carries no weight as it was not prepared by a quantity surveyor. It is also noted that the valuer's report failed to take into account incidental costs relating to development costs. SP1 who prepared the report also admitted that the figures in his report were cut and pasted from exh P2 prepared earlier by

Megajaya. In the final analysis, the claim for damages was not proved on a balance of probabilities.

[19] Be that as it may, we note that the learned JC had found that the loss and damages were foreseeable and not remote. In the circumstances, since Megajaya failed to prove the facts and the amount of damages, we are of the view that nominal damages should be awarded to Megajaya. Accordingly, we ordered that nominal damages in the sum of RM100 in favour of Megajaya. As Bahari Choy's appeal was allowed in part, we made no order as to costs of this appeal.

Order accordingly.

Reported by Ashok Kumar

A

B

C

D

E

F

G

H

I